Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-172

JOHN F. KENNEDY AND ROSEMARY KENNEDY, his wife AND
JAMES R. MELINSON AND MONICA MELINSON, his wife, AND
RICHARD J. BRAEMER AND TONI BRAEMER, his wife AND
all Parents of Nonpublic School Students
similarly situated, *Petitioners*

v.

ALTON J. LEMON, NEAL F. BRACKEN AND
BENJAMIN S. LOWENSTEIN
GRACE SLOAN, State Treasurer of the Commonwealth
of Pennsylvania
HENRY E. CROUTER, *Intervenor*
JOSE DIAZ, *et al.*, *Intervenor*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	12
Appendix	A1

TABLE OF CITATIONS

Cases:

Consolidated Edison Co. v. F. P. C., 511 F.2d 372 (D. C. Cir. 1974)	8
Dombrowski v. Pfister, 380 U.S. 479 (1965)	8
Fuentes v. Shevin, 407 U.S. 67 (1972), *reh. denied*, 409 U.S. 902 (1972)	9
Lemon v. Kurtzman, 411 U.S. 192 (1973)	3
Lemon v. Kurtzman, 403 U.S. 602 (1971)	4
Lemon v. Sloan, Order Denying Petition For Declaratory Relief, Civil Action No. 71-2223 (E.D. Pa., Filed July 21, 1975)	7
Roemer v. Board of Public Works, 96 S.Ct. 2337 (1976)	11
Sloan v. Lemon, 413 U.S. 825 (1973), *reh. denied*, 414 U.S. 881 (1973)	2
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	8

TABLE OF CITATIONS—*(Continued)*

Constitution and statutes:	Page
UNITED STATES CONSTITUTION:	
First Amendment:	
Establishment Clause	4
Fifth Amendment:	
Due Process Clause	9
Nonpublic Elementary and Secondary Education Act, Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§5601-5608 (1976-1977 Supp.)	4
Parent Reimbursement Act for Nonpublic Education, Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710, (1976-1977 Supp.)	2
28 U.S.C. §1254(1) (1964)	2
Rules:	
Federal Rules of Civil Procedure:	
60(b)	6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No. _____

ALTON J. LEMON, NEAL F. BRACKEN
and BENJAMIN S. LOWENSTEIN

v.

GRACE SLOAN, STATE TREASURER OF
THE COMMONWEALTH OF PENNSYLVANIA
HENRY E. CROUTER, *Intervenor*
JOSE DIAZ, *et al.*, *Intervenor*

JOHN F. KENNEDY and ROSEMARY KENNEDY, his wife and JAMES R. MELINSON and MONICA MELINSON, his wife and RICHARD J. BRAEMER and TONI BRAEMER, his wife and all Parents of Nonpublic School Students similarly situated,
Petitioners

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

John F. Kennedy and Rosemary Kennedy, his wife and James R. Melinson and Monica Melinson, his wife, and Richard J. Braemer and Toni Braemer, his wife, and all Parents of Nonpublic School Students similarly situated, petitioners, pray that a Writ of Certiorari issue to review

the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on May 11, 1976. The petitioners call upon this Court to exercise its power of review only so far as to examine the need for remanding this matter to the lower court together with instructions requiring such court to conduct a plenary hearing on the issues presented herein.

OPINIONS BELOW

The U.S. Court of Appeals for the Third Circuit rendered no opinion: its order issued on May 11, 1976, affirming the decision of the three-judge U.S. District Court for the Eastern District of Pennsylvania is set forth in the Appendix, *infra*, at A-13 to A-14.

The order of the three judge U.S. District Court for the Eastern District of Pennsylvania denying petitioners' request for declaratory relief was entered on July 21, 1975, and is set forth in the Appendix, *infra*, at A-12. No opinion was rendered.

The original injunction order prohibiting the payment of funds to parents under the Parent Reimbursement Act for Nonpublic Education, Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710 (Supp. 1976-1977), with which this brief concerns itself was entered by the three-judge U.S. District Court for the Eastern District of Pennsylvania on July 21, 1972, and is set forth in the Appendix, *infra*, at A-7 to A-8. On June 25, 1973, the U.S. Supreme Court affirmed and found Act 92 to be unconstitutional. The opinion of the U.S. Supreme Court is reported as *Sloan v. Lemon*, 413 U.S. 825 (1973) (hereinafter *Sloan*).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 11, 1976. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) (1964).

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the U.S. Supreme Court's affirmation in *Sloan* of a three-judge District Court's order enjoining the disbursement of monies collected under a statute for the benefit of parents of nonpublic school children serves to preclude the three judge District Court from subsequently ordering any modifications of its original order.

2. Whether the decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), (hereinafter *Lemon II*), permitting payments to schools for the period prior to this Court's invalidation of a state statute which sought to reimburse nonpublic schools for their expenditures, warrants an order directing that a plenary hearing be held to determine if there should be a modification of the original three-judge injunctive order herein so as to allow the parents the opportunity to obtain similar relief as was granted to the schools.

3. Whether a refusal to remand this matter for a full hearing by a three-judge court to determine if the injunctive order should be modified will deprive the petitioners of due process and cause them to suffer irreparable harm.

STATUTE INVOLVED

The statute involved is entitled "Parent Reimbursement Act for Nonpublic Education", Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710 (Supp. 1976-1977) (hereinafter Act 92). The text is set forth in the Appendix, *infra*, at A-1 to A-6.

STATEMENT OF THE CASE

Act 92 became effective on August 27, 1971. It established a program for reimbursing parents of nonpublic school children directly for tuition contracted for by them for their children at the maximum rate of $75 per child in elementary school and $150 per child in high school. The program was funded through a cigarette tax set up under the Act.

On July 21, 1972, a three-judge U.S. District Court for the Eastern District of Pennsylvania entered an order permanently enjoining the disbursement of any funds under Act 92.

On June 25, 1973, the Supreme Court of the United States affirmed the decision of the three-judge court, holding that Act 92 violated the Establishment Clause of the First Amendment in that its primary effect was the advancement of religion (*Sloan*).

That decision followed the reasoning of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter *Lemon I*), which declared unconstitutional a like statute entitled "Nonpublic Elementary and Secondary Education Act," Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§ 5601-5608 (1976-1977 Supp.) (hereinafter Act 109) that provided for reimbursement by the Commonwealth of Pennsylvania to nonpublic schools for cost of teachers' salaries, textbooks and instructional materials as an excessive entanglement of State and religion.

Despite its ruling in *Lemon I*, the Supreme Court on April 2, 1973, *after* the briefs had been filed in *Sloan*, ruled that nonpublic schools were entitled to reimbursement for expenditures made in reliance on Act 109 between the time of its enactment and its invalidation by the Court (*Lemon II*).

Guided by the reasoning of *Lemon II*, appellants John F. Kennedy, James R. Melinson, Richard Braemer and their respective spouses commenced a class action on February 14, 1974, in the Commonwealth Court of Pennsylvania on behalf of themselves and all parents of nonpublic school children who had paid tuition and who had duly requested reimbursement under Act 92. This class is composed of 205,392 parents of 391,474 children in nonpublic schools for the 1971-72 school year and as many parents as are represented by 145,000 claim forms for the 1972-73 school year. The plaintiffs named as defendant the Pennsylvania Parent Assistance Authority, who filed preliminary objections to the suit, raising among other issues the injunction which had been issued by the three-judge District Court in *Sloan* on July 21, 1972, restraining Grace Sloan, who was the disbursing officer for the Authority, from disbursing any funds under Act 92.

On October 24, 1975, before argument was heard in Commonwealth Court on the preliminary objections, the Commonwealth of Pennsylvania and its Treasurer, Grace Sloan, were granted leave to join as parties defendant to the suit. The suit was stayed, pending disposition by the U.S. District Court of a joint petition for declaratory relief filed by all parties in interest requesting that Court to review its injunctive order in light of the U.S. Supreme Court's ruling in *Lemon II*. It was the parents' position that the injunction of July 21, 1972, should be modified by the Court to allow reimbursement to parents for tuition paid or contracted to be paid by them between the date of enactment of Act 92 and that of its invalidation by the U.S. Supreme Court in *Sloan* in the same manner as the Supreme Court had authorized reimbursement to nonpublic schools in *Lemon II*.

The Commonwealth of Pennsylvania was similarly concerned as to whether *Lemon II* brought about any changes in their position under the original injunctive order. *Lemon II* had created uncertainty as to what the Commonwealth was to do with the approximately 93 million dollars which had been collected by the Authority for the parents. Thus the relief sought by the petition for declaratory relief would have been of benefit to all parties.

Jurisdiction was found to lie with the three-judge District Court because it was most suitable for the issuing court to interpret or modify its own order. Rule 60(b) of the Federal Rules of Civil Procedure enables a three-judge court to grant this type of relief.

Without receiving briefs and without oral argument, the three-judge court summarily denied the request for declaratory relief with an order on July 21, 1975. It said that its final order of July 21, 1972, was clear on its face, could not be made clearer by further explanation, had been affirmed by the Supreme Court, and therefore modification of it was inappropriate. It appeared that the court had refused to consider the impact of *Lemon II* on its original order.

An appeal to the Third Circuit Court of Appeals was filed on August 20, 1975. The Court of Appeals affirmed the three-judge District Court decision and in so doing followed the same course taken by the three-judge District Court by refusing to consider whether *Lemon II* necessitated a modification of the original injunctive order of July 21, 1972.

REASONS FOR GRANTING THE WRIT

I. The Incorrect Interpretation of Sloan by the Lower Courts Forecloses the Possibility of a Full Review of the Petitioners' Position.

Despite the fact that both the parents and the State Treasurer of the Commonwealth of Pennsylvania jointly sought declaratory relief in order to have the three-judge District Court review their original injunction in light of *Lemon II*, the court summarily refused to do so. The primary reason cited for this refusal was the three-judge District Court's belief that the U.S. Supreme Court's decision in *Sloan* foreclosed them from granting any subsequent relief:

> The Supreme Court's affirmance of our final order makes any substantive modification of it inappropriate. *Order Denying Petition For Declaratory Relief*, Civil Action No. 71-2223 (E.D. Pa., Filed July 21, 1975).

The petitioners herein respectfully submit that this Court could not have intended that its decision in *Sloan* should have such an effect. In *Sloan*, the Supreme Court addressed itself exclusively to the issue of the Act's constitutionality. The Court held that Act 92 was contrary to the Constitution. The Court did not say additionally that its decision was to be applied retroactively so as to prevent the parents from receiving payments that were due to them prior to the time that the Act was declared invalid.

The three-judge District Court, with the Court of Appeals affirming, has stretched this limited holding beyond its intended bounds. This becomes quite evident when we consider the fact that a similar finding of unconstitutionality with respect to Act 109 in *Lemon I* did not prevent this Court in *Lemon II* from permitting payments to be made to the schools for the period prior to that act's invalidation.

It is doubtful that this Court would look with favor on having its decisions interpreted inconsistently so as to bring about a situation where a finding of unconstitutionality with respect to Act 109 would nevertheless permit subsequent modification to allow back payments to schools, while a like decision with respect to Act 92 would result in a foreclosure of such subsequent relief to parents.

Even without looking to the procedure followed by this Court in dealing with the schools, there are ample other grounds to require the lower courts to fully entertain the issue presented in the Joint Petition for Declaratory Relief.

The three-judge Court could have chosen to consider the matter pursuant to its inherent power to exercise continuing supervision over injunctive decrees:

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). See also *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965).

Some courts have gone one step further by suggesting that the issuing court has an actual responsibility to take such corrective action when one of its prior orders is turned into an instrument of harm because of changed circumstances. *Consolidated Edison Co. v. F. P. C.*, 511 F.2d 372, 378 (D.C. Cir. 1974).

When the three-judge District Court issued its original injunction on July 21, 1972, *Lemon II* had not been decided. However, with the decision in *Lemon II*, it became apparent to the petitioners herein that a change in the law had taken place, enabling them to receive payments for funds due them prior to *Sloan*. The Commonwealth of Pennsylvania considered this a real possibility, for it too joined in the Joint Petition for Declaratory Relief.

Whether this Court wishes to avoid the inconsistency of allowing payments to the schools, while at the same time preventing payments to the petitioners, or whether the Court desires to utilize the "changed circumstances" approach, there seems to be a sufficient basis for this Court to remand this action to a lower court for a full hearing on the merits of the issues presented in the Joint Petition for Declaratory Relief.

II. Due Process Requires That the Petitioners Whose Interests Were Not Discussed in Sloan Deserve a Hearing to Determine the Merits of Their Position.

Petitioners were not parties to *Sloan*. The parties to that action were only concerned with having this Court

adjudicate the single issue of the constitutionality of Act 92. At no time did any court consider the impact of the holding in *Lemon II* upon the instant suit and decide whether payment to parents should be allowed for the period of time between the passage of Act 92 and its subsequent invalidation by this Court.

Nevertheless, the result of the decisions of the lower courts is that the holding in *Lemon II* will not be taken into account and that the petitioners are barred from receiving payments for the period of time between the passage of Act 92 and its subsequent invalidation in *Sloan*.

This position of the lower courts violates the spirit of the Due Process Clause of the Fifth Amendment which provides that, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONSTITUTION, *Amend. V.*

The parents herein have not been accorded due process before being deprived of the funds which the Commonwealth of Pennsylvania led them to reasonably rely would be theirs.

The right of persons to be heard before their property interests can be invaded has been repeatedly upheld:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. . . . *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972), *reh. denied*, 409 U.S. 902 (1972).

Due process is a right which this Court has strongly supported in situations involving just one individual. It is imperative to take such a stance where the rights of

over 200,000 persons are in danger of being cut off without a chance of having their grievances aired fully in a court of law.

III. The Foreclosing of the Petitioners' Right to Have Their Day in Court and the Gross Injustice That Flows Therefrom Is Such a Departure From the Accepted and Usual Course of Judicial Proceedings So as to Call for an Exercise of This Court's Power of Supervision.

The denial of the petitioners' request for declaratory relief has created a serious injustice. The nonpublic schools, under *Lemon II*, have been reimbursed for the expenditures which they contracted to incur under Act 109 prior to its invalidation. Yet, the parents who were caused to rely on a similar state statute are told that not only are they entitled to nothing, but that the courts will not even provide them with a forum to hear their grievance.

Thus over 200,000 parents are left to conclude that the judicial system stands ready to hear the grievances of powerful institutions, but that when it comes to individuals, the courthouse door is closed.

Many of the parents herein head families which are in the middle and lower income brackets. Parents who have as many as four or five children in nonpublic schools would have been expecting as much as $1,500 in reimbursements during the two year period prior to the Act's invalidation. Many parents may have borrowed to pay their children's tuition bills relying on the expected reimbursements to pay for the loans. These debts may still be outstanding and thus remain as a continuing burden.

In addition to those families who relied on Act 92 and sent their children to nonpublic schools, there are also those parents, who, although they were able to undertake tuition costs without help from the state, have been

misled into thinking that a portion of their budget was now free to be spent in other ways. The U.S. Supreme Court has recently recognized that this is in fact the spending pattern that is brought about when state aid is promised to religious institutions:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. *Roemer v. Board of Public Works*, 96 S.Ct. 2337, 2345 (1976).

It is suggested that many of the parents as individuals behaved in much the same manner.

From the foregoing, it is evident that the overwhelming number of parents who presented applications under Act 92 were caused to undergo some degree of hardship when they were not reimbursed as they reasonably believed they would be.

Neither the U.S. District Court for the Eastern District of Pennsylvania nor the U.S. Court of Appeals for the Third Circuit have been willing to provide the forum for righting this wrong. It now remains for the Supreme Court of the United States to open the courthouse doors so that the small man may enter. The courts of this land must open as freely to the individual as they do to large and powerful institutions. At this point, only the Supreme Court of the United States can bring this principle into being.

The three-judge court's order of July 21, 1975, *supra*, citing their belief that "the Supreme Court's affirmance of our final order makes any substantive modification of it inappropriate," and the Court of Appeals' affirmance of this order may be viewed as an attempt to constructively certify the issue to this Court. The lower courts may welcome a pronouncement by the Supreme Court which will unbind their hands so that they can entertain the issues presented in the Joint Petition for Declaratory Relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted to decide if this Court should instruct the three-judge District Court to grant a plenary hearing so as to permit a full airing of the petitioners' position in light of *Lemon II*.

Respectfully submitted,

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Act of Aug. 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710 (Supp. 1976-1977)
PARENT REIMBURSEMENT ACT FOR NONPUBLIC EDUCATION

AN ACT

HB 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to

transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may

legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however, That it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other per-

sons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P.L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbursement hereunder, the parent of a student shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents.—Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for

each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a wilfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid

part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A. D. 1971.

/s/
MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

/s/
C. DELORES TUCKER
Secretary of the Commonwealth

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 71-2223

ALTON J. LEMON, NEAL F. BRACKEN AND
BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania, et al.

ORDER

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the

"Parent Reimbursement Act For Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

BY THE COURT:

/s/
William H. Hastie
Senior Circuit Judge

/s/
Joseph S. Lord, III
Chief District Judge

/s/
John B. Hannum
District Judge

(Caption Omitted in Printing)

PETITION FOR DECLARATORY RELIEF

AND Now comes defendant Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania, by her attorney J. Justin Blewitt, Jr., Deputy Attorney General and the Pennsylvania Parent Assistance Authority by its attorney Joseph J. Carlin, Esquire, and John F. and Rosemary Kennedy, James R. and Monica Melinson and Richard J. and Toni Braemer, by their attorneys Charles V. Stoelker, Jr., Esquire, and Allen L. Rothenberg, Esquire, and hereby petition for declaratory relief concerning this Court's order of July 21, 1972 in the above captioned matter for the following reasons:

1. This Court entered an order on July 21, 1972 permanently enjoining the disbursement of any funds under the "Parent Reimbursement Act for Nonpublic Education." Pa. Stat. Ann. tit. 24, §§5701-5709 (Supp. 1974-1975).

2. On June 25, 1973 the Supreme Court of the United States affirmed the decision of this Court, concluding that the Act was violative of the Establishment Clause of the First Amendment in that the primary effect of the Act was the advancement of religion.

3. John F. and Rosemary Kennedy, James R. and Monica Melinson, Richard J. and Toni Braemer are the parents of children who attended nonpublic schools during the 1971-72 and 1972-73 school years.

4. These parents on their own behalf and on behalf of all other parents similarly situated instituted an action in the Commonwealth Court of Pennsylvania (No. 199 C.D. 1974) against the Pennsylvania Parent Assistance Authority claiming that they were entitled to reimbursement for the tuition which they paid on behalf of their children for the two school years prior to the decision of the Supreme Court invalidating the Act.

5. Grace Sloan, State Treasurer, and the Commonwealth of Pennsylvania petitioned to intervene in that proceeding. By agreement of the parties and Grace Sloan, the Commonwealth Court proceeding was stayed "pending disposition of petition for declaratory relief to be filed in the United States District Court for the Eastern District of Pennsylvania as of *Lemon v. Sloan*, Civil Action No. 71-2223" (Order of May 29, 1975, No. 199 C.D. 1974, a copy of which is attached hereto).

6. It is the position of Grace Sloan, State Treasurer, that this Court's Order of July 21, 1972 absolutely precludes the relief sought by plaintiffs in the Commonwealth Court litigation by virtue of the very terms of the order and because of the rationale of this Court which led to the entry of that order and the opinion of the Supreme Court

which affirmed that order. It is the position of Grace Sloan, State Treasurer that this Court's Order of July 21, 1972 should not be amended or modified. It is further the position of Grace Sloan, State Treasurer, that the monies presently encumbered in the Parent Reimbursement Fund (Pa. Stat. Ann. tit. 24, §5705 (Supp. 1974-1975) to pay claims which may arise from the Commonwealth Court litigation, are presently needed for other more pressing and immediate demands of the Commonwealth and its citizens.

7. It is the position of the Pennsylvania Parent Assistance Authority that this Court's order of July 21, 1972 until modified precludes the relief plaintiffs seek in the Commonwealth Court litigation and that under applicable principles of law this Court's order must be modified.

8. It is the position of John F. and Rosemary Kennedy, James R. and Monica Melinson and Richard J. and Toni Braemer that this Court's order of July 21, 1972 by its terms precludes the relief they seek in the Commonwealth litigation but that modification of that order would be appropriate based on their argument that they relied on the validity of the Act in sending their children to non-public schools and are entitled to payment for the time prior to the Supreme Court's determination that the Act was unconstitutional.

9. It is the position of all petitioners that it is the prerogative of the issuing court to interpret its own orders and that such is not the proper role of any other tribunal. It is further the position of all petitioners that resort to this forum constitutes the most appropriate and expeditious manner in which to resolve the dispute between the petitioners as to the proper interpretation of this Court's decree.

FOR ALL OF THE ABOVE REASONS the petitioners hereby request declaratory relief in the form of an order interpreting this Court's original order of July 21, 1972 in light of the argument advanced by plaintiffs in the Commonwealth Court litigation.

Petitioners, moreover, respectfully request that this Court direct that all parties to the case of *Lemon v. Sloan* as well as the instant petitioners, file briefs in support of their respective positions and that this Court schedule a prompt hearing on the matters raised herein.

Respectfully submitted,

/s/
J. Justin Blewitt, Jr.
Deputy Attorney General
Attorney for Grace Sloan,
State Treasurer

/s/
Charles V. Stoelker, Jr., Esquire

/s/
Allen L. Rothenberg, Esquire
Attorneys for Kennedy, Melinson and Braemer

/s/
Joseph J. Carlin
Attorney for Pennsylvania
Parent Assistance Authority

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 71-2223

ALTON J. LEMON, et al.

v.

GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania, et al.

ORDER

AND NOW, this 21st day of July, 1975, having considered the petition for declaratory relief in this case and this court being satisfied that our final order of July 21, 1972 is clear on its face and binding upon the parties and that its meaning and effect would not be made clearer by futher explanation, and believing that the Supreme Court's affirmance of our final order makes any substantive modification of it inappropriate, it is ORDERED that the petition for declaratory relief be and it is hereby DENIED.

BY THE COURT

/S/
William H. Hastie
Senior Circuit Judge

/S/
Joseph S. Lord, III
Chief District Judge

/S/
John B. Hannum
District Judge

Nos. 75-2111 and 75-2112

ALTON J. LEMON, NEAL F. BRACKEN, AND
BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, State Treasurer of the
Commonwealth of Pennsylvania
HENRY E. CROUTER, *Intervenor*
JOSE DIAZ, et al., *Intervenor*

PENNSYLVANIA PARENT ASSISTANCE AUTHORITY,
Petitioner, Appellant,
No. 75-2111

(D.C. Civil No. 71-2223)

ALTON J. LEMON, NEAL F. BRACKEN, AND
BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, State Treasurer of the
Commonwealth of Pennsylvania
HENRY E. CROUTER, *Intervenor*
JOSE DIAZ, et al., *Intervenor*

JOHN F. KENNEDY AND ROSEMARY KENNEDY, his wife, and
JAMES R. MELINSON and MONICA MELINSON, his wife, and
RICHARD J. BRAEMER and TONI BRAEMER, his wife,
Petitioners, Appellants
in No. 75-2112

(D.C. Civil No. 71-2223)

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
May 6, 1976

Before: ALDISERT, GIBBONS AND GARTH, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT.

/s/
Circuit Judge

Attest:

/s/
Thomas F. Quinn, Clerk

DATED: May 11, 1976

Certified as a true copy and issued in lieu
of a formal mandate on June 2, 1976.

/s/
Test:
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

Supreme Court, U. S.
FILED
SEP 7 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976
No. 76-172

JOHN F. KENNEDY and ROSEMARY KENNEDY, His Wife and JAMES R. MELINSON and MONICA MELINSON, His Wife, and RICHARD J. BRAEMER and TONI BRAEMER, His Wife and All Parents of Nonpublic School Students Similarly Situated,

Petitioners

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN
GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania
HENRY E. CROUTER, Intervenor
JOSE DIAZ, et al., Intervenor,

Respondents

BRIEF IN OPPOSITION TO PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
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TABLE OF CONTENTS

	PAGE
Statement of Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ:	
I. Petitioners' claim has been judicially reviewed and rejected by the lower courts	5
II. The District Court and Court of Appeals correctly refused to modify an order which had previously been affirmed by this Court	6
III. The State's compliance with a Federal Court order prohibiting payment under an unconstitutional statute is not a taking of property without due process of law	11
Conclusion	13

TABLE OF CITATIONS

CASES:

Board of Regents v. Roth, 408 U.S. 564 (1972)	11
Goss v. Lopez, 419 U.S. 565 (1975)	11
Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. three-judge Court 1969)	8
Lemon v. Kurtzman, 403 U.S. 602 (1971)	2, 7, 8, 10
Lemon v. Kurtzman, 411 U.S. 192 (1973)	2, 3, 5, 6, 7, 8, 9, 10, 12
Sloan v. Lemon, 413 U.S. 825 (1973)	2, 3, 5, 7, 8, 10

STATUTES:

"Non-Public Education and Secondary Education Act", Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§5601-5608 (1976-1977 Supp.) 6

"Parent Reimbursement Act for Non-Public Education", Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §5701 .....2, 7, 11, 12

STATEMENT OF QUESTIONS PRESENTED

I. Was Petitioners' claim judically reviewed and rejected by the lower courts?

II. Did the District Court and Court of Appeals correctly refuse to modify an order which had previously been affirmed by this Court?

III. Does the State's compliance with a Federal Court order prohibiting payment under an unconstitutional statute constitute a taking of property without due process of law?

STATEMENT OF THE CASE

On July 21, 1972, a three-judge District Court held the Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §5701, (hereinafter Act 92), known as the "Parent Reimbursement Act for Non-Public Education" unconstitutional. Pursuant to that holding, the Court perpetually enjoined respondent Grace M. Sloan, Treasurer of the Commonwealth of Pennsylvania, from distributing funds under the Act. Pursuant to 28 U.S.C. §1253, this Court directly reviewed the three-judge District Court's order, and on June 25, 1973, affirmed. *Sloan v. Lemon*, 413 U.S. 825 (1973).

This Court's decision in *Sloan v. Lemon*, supra, came approximately two months after *Lemon v. Kurtzman* [*II*], 411 U.S. 192 (1973) *(Lemon II)*. In *Lemon II*, this Court held that the District Court to which *Lemon v. Kurtzman* [*I*], 403 U.S. 602 (1971), was remanded, did not abuse its discretion by compelling Pennsylvania to reimburse non-public schools for debts owed pursuant to purchase of service contracts between the schools and the State, since those services were performed prior to this Court's decision in *Lemon I*.

It is this Court's decision in *Lemon II* interpreting *Lemon I* that forms the gravamen of this case. Petitioners believe that *Sloan v. Lemon*, supra, is on all fours with *Lemon I*, supra, and, therefore, contend that the case *sub judice* should be a *"Sloan II"* premised upon the holding of *Lemon II*.

With that end in mind, John F. Kennedy, James R. Melinson, Richard Braemer, and their respective spouses,

all parents of children who attended non-public schools during the 1971-1972 and 1972-1973 school years commenced a class action in February 1974, against the Pennsylvania Parent Assistance Authority in the Commonwealth Court of Pennsylvania.

By agreement of all parties, the action in the Commonwealth Court of Pennsylvania was continued and a joint petition was filed before the three-judge District Court in *Sloan* which had issued the original order enjoining payments. The petitioners' position was that the three-judge District Court should modify its injunction to allow payments for the two school years because they had relied on the validity of the act in sending their children to non-public schools. Respondent Sloan, believed that the reasons underlying the three-judge Court's original order together with this Court's affirmance of that decision precluded any modification of that order, and that this Court's decision in *Lemon II* was inapplicable to the facts *sub judice*. On July 21, 1975, the three-judge District Court denied relief declaring:

> ". . . our final order of July 21, 1972, is clear on its face and binding upon the parties . . . and believing that the Supreme Court's affirmance of our final order makes any substantive modification of it inappropriate. . ."

Both Kennedy and the Pennsylvania Parent Assistance Authority appealed that order to the United States Court of Appeals for the Third Circuit. After submission of briefs, the Court of Appeals affirmed the judgment of the District Court on May 11, 1976.

Both Kennedy and the Pennsylvania Parent Assistance Authority are petitioning this Court for a writ of

certiorari to the United States Court of Appeals for the Third Circuit. This response is directed solely to the petition of Kennedy. The Pennsylvania Parent Assistance Authority's petition has not been docketed by this Court pending a determination of a motion to dispense with printing. If that motion is granted, respondent Sloan will move to have this brief in opposition serve as a response to both petitions, in light of the identical nature of the arguments presented.

REASONS FOR DENYING THE WRIT

I. Petitioners' Claim Has Been Judicially Reviewed and Rejected by the Lower Courts

Petitioners request this Court to grant their petition and issued a writ of certiorari to the United States Court of Appeals for the Third Circuit to consider whether the three-judge District Court should be instructed to conduct a "plenary hearing." This request and, indeed, much of petitioners' arguments premise upon an allegation that the District and Circuit Court refused to review the merits of petitioners' claim. This simply is not so.

Neither the District Court nor the Circuit Court found their jurisdiction lacking or abstained from rendering a determination. The substantive issue in the case *sub judice* is whether the injunctive order affirmed by this Court in *Sloan v. Lemon,* supra, must be modified in light of this Court's holding in *Lemon II,* supra. The issue is well defined by the previous decisions of this Court. The determination is a legal one, and a plenary hearing would serve no purpose.

The District Court and Court of Appeals had all the information necessary to fully review petitioners' claim. Pursuant to their discretionary power to modify or refuse to modify an injunction because of an alleged change of law, the District Court and Court of Appeals considered petitioners' arguments, and refused to modify the injunction. Petitioners' petition for a writ of certiorari misses

the mark when it asserts that the federal forums refused to hear this case. Petitioners' dissatisfaction is more properly directed at the decision which was, in fact, rendered by the District Court and affirmed by the Court of Appeals.

II. The District Court and Court of Appeals Correctly Refused To Modify an Order Which Had Previously Been Affirmed by This Court

---

Petitioners assert that respondent Grace Sloan, concurred in their belief that "there was a real possibility that the law had changed" (Petitioners' Brief at 8). Respondent Sloan believed then and believes now that the applicable law has not changed, and any amendment or modification of the injunctive order would be erroneous. The rationale for respondent Sloan joining in the petition for declaratory relief was to insure that the proper Court heard and settled this dispute.[1] Respondent Sloan submits that the dispute has now been properly heard and adjudicated by the appropriate forum. Consequently, there is no basis upon which this Court should grant certiorari.

Petitioners, on the other hand, claim that the District Court's and Court of Appeals' decision is in conflict with this Court's decision in *Lemon* [*II*], supra, and, therefore, this Court should review this case. There is, however, a great factual difference between Act 109[2] which was before this Court in *Lemon I and II*, and Act 92[3] which was before the Supreme Court in *Sloan v. Lemon*, supra. There is, moreover, a great difference between the operation of the two acts prior to the time they were each held unconstitutional by this Court. Finally, there is a great difference between the course of the litigation in the two cases. All three factors render this Court's *Lemon II* analysis inapplicable to the case *sub judice*.

The *Lemon I and II* statute authorized the payment to non-public schools of the actual costs incurred in providing specific secular educational services pursuant to purchase-of-service contracts with the State. The program was in full operation for two and one-half years before this Court declared it unconstitutional in June, 1971. *Lemon II*, 411 U.S. at 196-97. Payments had been made by the State to the non-public schools for the two school years beginning in September 1968 and ending in June 1970. The question before this Court in *Lemon II* was whether payments could be made as well for the 1970-71 school year.

The *Sloan* Act authorized the State to reimburse parents for a portion of tuition expenses incurred in sending their children to non-public schools. The Act became law on August 27, 1971. By the terms of the Act, parents were given until July 15th following the completion of the school year to apply for reimbursement. 24 P.S. §5706 (Supp. 1976-1977). Payments were to be made no later than September 15th following the completion of the school year. No payments were ever made under this Act since before the completion of the first school year following

---

[1] See paragraphs six and nine of the Petition for Declaratory Relief at p. A-11 of petitioners' appendix.

[2] "Non-public Education and Secondary Education Act," Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§5601-5608 (Supp. 1976-1977).

[3] Parent Reimbursement Act for Non-public Education, Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710 (Supp. 1976-1977).

its enactment, the Act was declared unconstitutional and all payments thereunder were enjoined. *Sloan,* supra, 413 U.S. at 827.

The Acts, then, in their operation, are completely distinguishable. The *Lemon I and II* Act was ruled constitutional by the District Court, *Lemon v. Kurtzman,* 310 F. Supp. 35 (E.D. Pa. three-judge court 1969) and continued in operation for two and one-half years until this Court reversed. The *Sloan* Act never went into operation[4] since payments were enjoined by the District Court prior to the first time that payments could have been made under it. The former was a functioning program; the latter never was.

Thus, in determining the applicability of *Lemon II's* discussion of reliance to the facts of this case, it is necessary to focus on three important facts: (1) No payments were ever made under the *Sloan* statute; (2) plaintiff's in the *Sloan* case made timely application for injunctive relief to preclude any payment from being made; and (3) in *Lemon II,* the District Court made a factual determination that there was reliance and this Court accepted this finding; here the District Court refused to find reliance.

In *Lemon II,* plaintiffs slept on their rights and did not attempt to stop any payments under the Act until after this Court had declared the Act unconstitutional. This

[4] It is true that the Act was in operation to the extent that the Authority created by Act was established and that many parents did make application for payment. However, it was not "in operation" in the same sense as the *Lemon I and II* Act wherein the State actually reimbursed the schools for their services for two school years and entered into contracts with the schools for the third school year.

Court gave great emphasis to that tactical decision of plaintiffs, noting that:

> "The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109." *Lemon II,* supra, 411 U.S. at 204.

No such argument can be made here since payments under the *Sloan* Act were enjoined at the earliest possible time.

In *Lemon II,* this Court gave great weight to the District Court's determination that the schools had relied on the continued validity of the Act in entering into and performing under contracts with the State for the year prior to the Act's invalidation by this Court. In fact, this Court specifically noted that counsel for plaintiffs had conceded reliance. *Lemon II,* supra, 411 U.S. at 204 n.5. The procedural posture of *Lemon II* is not akin to this case. In *Lemon II,* this Court noted that the District Court was vested with broad discretionary power, and their own power of appellate review was correspondingly narrow. *Id.* at 200. Later in this Court's opinion, obviously with its role as a reviewing court in mind, this Court held:

> "On this record the District Court could reasonably find reliance on the part of the appellee schools . . ." *Id.* at 206.

On the instant record, the District Court reasonably has found no reliance sufficient to justify any modification.

The Court of Appeals affirmed this finding. There are ample facts to support this holding, and this further supports the consistency of these holdings. Respondent Sloan submits there is no basis for the allegation of conflict between these decisions.

Finally, it must be noted that this Court in *Lemon II* viewed the school's reliance interest as one variable in the balancing test. *Lemon II* at 203. The other variable to be evaluated is the "constitutional interest at stake" in its original decision in *Lemon I*. The First Amendment violation which this Court found present there was that the program fostered an excessive entanglement between religion and the State. This Court in *Lemon II* concluded that the very factors which created such entanglement had already occurred and so the final payment for the last year of the Act's life would not give rise to any further entanglement. Hence, this Court concluded that, on balance, the constitutional harm was slight when weighed against the reliance by the schools (which reliance was conceded by the parties).

The "constitutional interest at stake" in *Sloan v. Lemon,* supra, was that the "primary effect" of paying money to the parents of children in non-public schools constituted the advancement of religion and was thus violative of the Establishment Clause. That constitutional violation cannot be cured as was the entanglement violation in *Lemon I*. For whatever time period petitioners urge that payments be made, the insuperable fact remains that such payment would be unconstitutional.

Hence, the *Lemon II* analysis cannot apply when this Court rules that the primary effect of legislation is the advancement of religion. Unlike "entanglement," that statutory defect cannot be cured. Nor can payments be made at any time under a statute, the primary effect of which advances religion.

III. The State's Compliance With a Federal Court Order Prohibiting Payment Under an Unconstitutional Statute Is Not a Taking of Property Without Due Process of Law

---

Petitioners present a novel procedural due process claim. They assert that the respondent's compliance with the District Court's order perpetually enjoining the respondent from paying funds under Act 92, which was affirmed by this Court, constitutes a taking of property in violation of the Fourteenth Amendment's Due Process Clause. This argument is specious.

To support their argument, petitioners must prove a legally cognizable property interest in the funds allocated by this Act. *Goss v. Lopez,* 419 U.S. 565, 572, (1975). They also must prove that the State deprived them of this property. *Id.* at 574. Finally, they must prove that the taking of their property was accomplished without meaningful notice and hearing. *Id.* at 579.

Petitioners had no property interest in the moneys that were collected for eventual reimbursement. The Fourteenth Amendment is not, itself, a source of any property rights. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Goss v. Lopez,* supra, at 572. "Rather they [property rights] are created and their dimensioins are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez,* supra at 572-573.

In the case *sub judice* the property rights must flow, if at all, from Act 92.[5] An examination of the Act evidences no intent to create any property rights. In fact, section nine of the Act evidences a strong contrary intent. In Section seven of the Act, the legislature specifies tuition reimbursement payments of $75.00 per elementary student and $150.00 per high school student. Section nine, however, provides that in the event of insufficient moneys the tuition reimbursement payment is to be reduced to a percentage computed by dividing the number of claims into the amount of moneys. (See petitioners' Appendix at A-5.) No parent was ever reimbursed under the Act, nor was any sum certain ever guaranteed. Unlike *Lemon v. Kurtzman II*, supra, no contract was signed between the State and parents. Petitioners had no more than a "unilateral expectation" rising from the passage of a bill by the State Legislature. Clearly, this is not enough:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, supra at 577.

The State did not deprive petitioners of these funds. The statutory authorization for payment was declared unconstitutional and a Federal Court enjoined the State from making payments. To characterize that Court's injunction against the State as a taking by the State, is a clear distortion of the meaning of the Due Process Clause and should be summarily rejected.

---

[5] The full text of this Act is set forth at pp. A-1 to A-6 of Petitioners' brief.

CONCLUSION

For all of the above reasons, Respondent Sloan respectfully requests that this Court deny petitioners' petition for writ of certiorari.[6]

Respectfully submitted,

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Date: August 30, 1976

---

[6] Petitioners claim the three-judge District Court and the Court of Appeals have "constructively" certified this question to this Court. This contention overlooks the fact that 28 U.S.C. §1254(3) provides this Court with power to review a question certified "at any time by a Court of Appeals of any question of law . . . to which instructions are desired. . ." Consequently, there is no reason to assume that the lower Court would constructively certify a case, rather than employ the jurisdictional avenue available for certification of appropriate questions. Moreover, there is no evidence of an unwillingness to decide this issue. Petitioners' contentions were squarely rejected by both the District Court and Court of Appeals.

Supreme Court, U. S.
FILED
SEP 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-172

JOHN F. KENNEDY and ROSEMARY KENNEDY, his wife, and JAMES R. MELINSON and MONICA MELINSON, his wife, and RICHARD J. BRAEMER and TONI BRAEMER, his wife, and all Parents of Nonpublic School Students, similarly situated,

Petitioners,

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,
GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania,
HENRY E. CROUTER, Intervenor,
JOSE DIAZ, *et al.*, Intervenors,

Respondents.

BRIEF OF PLAINTIFFS-RESPONDENTS ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-172

JOHN F. KENNEDY and ROSEMARY KENNEDY, his wife, and JAMES R. MELINSON and MONICA MELINSON, his wife, and RICHARD J. BRAEMER and TONI BRAEMER, his wife, and all Parents of Nonpublic School Students, similarly situated,

Petitioners,

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,
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HENRY E. CROUTER, Intervenor,
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BRIEF OF PLAINTIFFS-RESPONDENTS ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This brief is submitted in opposition to the petitions for writ of certiorari filed in this matter by John F. Kennedy, *et al.* and by the Pennsylvania Parent Assistance Authority.

We address ourselves herein briefly to the substantive issue raised in these petitions for certiorari, noting only that serious procedural and jurisdictional questions are also present—questions involving the standing of petitioners to seek modification of a judgment in a suit to which they were not parties, the legal existence today of the petitioner Pennsylvania Parent Assistance Authority, the justiciability in the federal courts of a controversy between a state agency and the state which established it and similar formidable barriers to this suit or proceeding, whatever its nature might be.

Efforts to evade or frustrate particular decisions of this Court upholding claims asserted under the Bill of Rights are hardly new. The most notable instances, of course, are in the arena of racial equality, where the means used have included such devices as Grandfather Clauses, racial restrictive covenants, poll taxes and separate but equal facilities. Closer to home are efforts aimed at bringing religious teachings or practices into the public schools, notwithstanding this Court's decisions in *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); and *Abington School District* v. *Schempp,* 374 U.S. 203 (1963). See, *e.g., DeKalb School District* v. *DeSpain,* 255 F. Supp. 655, *aff'd* 384 F. 2d 836, *certiorari denied* 390 U.S. 906 (1968); *Stein* v. *Oshinsky,* 224 F. Supp. 757, *aff'd* 348 F. 2d 999, *certiorari denied* 382 U.S. 957 (1965); *Board of Education of Netcong, N.J.* v. *State Board of Education,* 108 N.J. Super. 564, 262 A.2d 21, 57 N.J. 172, 270 A. 2d 412, *certiorari denied* 401 U.S. 1013 (1971).

With one significant difference, the present suit marks another instance of a campaign of evasion leveled against

a decision of this Court, this time in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971). See, *e.g., Levitt* v. *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Marburger* v. *Public Funds for Public Schools,* 412 U.S. 916, 413 U.S. 916 (1973), 417 U.S. 961 (1974); *Meek* v. *Pittenger,* 421 U.S. 349 (1975). The difference between these instances and the present one is that the latter is not an effort by the state, through its legislative or executive branches, but rather to its credit is resisted by the state.

Ever since *Marbury* v. *Madison,* 1 Cranch 137 (1803), it has been the universal assumption that except in extraordinary cases, a statute unconstitutional on its face does not give rise to rights and claims enforceable after its unconstitutionality has been adjudicated. This assumption is based upon the premise that the courts do not make the statute unconstitutional but only declare its unconstitutionality. The principle is applicable to adjudications of unconstitutionality under the Establishment Clause of the First Amendment no less than under other provisions of the Constitution. Applying that principle in *Marburger* v. *Public Funds for Public Schools, supra,* the District Court went further than the courts below in the present case. It required the nonpublic schools to turn back to the state the benefits they had received under the invalidated statute.

All the petitioners herein rely exclusively on *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*); they cite no other authority in support of their claim. But an examination of the plurality opinion in that case reveals that, rather than supporting the claim, the decision is directly

contrary to it. In that case, this Court did not mandate that the judgment of unconstitutionality be given only prospective effect. It held only that, in the absence of clear abuse of discretion, it would not reverse the decision of the trial court to limit the judgment prospectively. The Court's language is unambiguous (411 U.S. at 200):

> In shaping equity decrees, the trial court is vested with broad discretionary powers, and the appellate review is correspondingly narrow.

In the present case, the trial court exercised its discretion not to limit the judgment prospectively from the time of affirmance by this Court. Plainly, this cannot be deemed an abuse of discretion; hence, it is not subject to appellate rescission.

Moreover, in *Lemon II*, there had been reasonable ground for the legislature to believe that the statute it enacted might be adjudged constitutional by this Court in view of its prior decisions in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The legislative effort was not to evade existing decisions of this Court but at most to extend their holdings. That effort could not be adjudged unreasonable in view of the broad language of the opinion in the latter case, language which could be viewed as requiring a result contrary to that ultimately reached by the majority of this Court. In the present case, nothing in *Lemon II* or *Earley* v. *DiCenso* or any other post-*Allen* decision of this Court could be construed as affording ground for belief that the statute here in issue would be upheld.

We note further that, in *Lemon II*, this Court determined that, under all the circumstances, it could not be held as a matter of law that the defendants acted unreasonably in relying upon the validity of the statute until it was adjudged unconstitutional by this Court. *In that case, however, the District Court had upheld the constitutionality of the statute; in the present case it ruled it invalid.* It would be a startling innovation in our legal system were the Court to hold that parties may rely upon anticipated appellate reversal of a lower court decision and demand indemnification if their anticipation proves incorrect.

Finally, we suggest that acceptance of the petitioners' premise in this case would make a nullity of the Establishment Clause as it applies to financing of church schools. All that a state need do is enact even a patently unconstitutional aid statute and wait for a judicial challenge to its constitutionality to be launched. How that challenge would be determined would be of little significance. Even if the statute were held unconstitutional by all the courts, called upon to pass on it, including this Court, not only would be sums previously paid thereunder be retained, but the beneficiaries would be entitled to receive all the moneys not paid to them until this Court's final disposition. At that point the game could be started all over by the simple expedient of passing another statute, slightly different in wording but seeking the same unconstitutional end of financing church school out of tax-raised funds. We do not believe that in deciding *Lemon II* this Court intended to countenance that game.

For the reasons set forth, the petitions for writs of certiorari herein should be denied.

Respectfully submitted,

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